564160-9

564160-9

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No. 56460-9-I

Yellow

THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

ALI ELMI,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Richard McDermott

APPELLANT'S SUPPLEMENTAL REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

A. AUTHORITY TO FILE SUPPLEMENTAL REPLY BRIEF

By order of October 4, 2006, this Court directed appellant to file a reply to the Respondent's Supplemental Brief within 20 days of the date of filing. State v. Elmi, COA No. 56460-9 (Order of October 4, 2006).

B. ARGUMENT

THE CASES CITED BY THE STATE SUPPORT THIS COURT'S HOLDING IN ALLEN THAT UNINTENDED VICTIMS MUST BE "ACTUAL VICTIMS" OF ASSAULT IN ORDER FOR THE DEFENDANT TO BE FOUND GUILTY UNDER A TRANSFERRED INTENT THEORY.

As Mr. Almi noted in his Supplemental Brief, the case of State v. Allen, 2001 Wash. App. LEXIS 532 (2001), relied for its holding on evidence showing the occurrence of assaultive harm to the victims in that case, which is not present in Mr. Elmi's case.

In its brief, the respondent recognizes that this was the principle applied in Allen. The State argues that Mr. Elmi intended to inflict great bodily injury on Fadumo Aden, and that the children were "afraid" during the shooting. Supplemental Brief of Respondent, at pp. 5-6. Putting aside for the moment[1] the fact that

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[1] See Appellant's Supplemental Brief, at Part B.2(ii) (discussing the issue

combining an element of intent to inflict great bodily injury (a component of assault by attempted battery or by actual battery), with the result of apprehension of harm (a component of assault by causing apprehension of harm), does not amount to the necessary elements of any definition of common law assault, the State's argument misstates the nature of the "fear" required for a person to be an assault victim, and misrepresents the record, which shows that there is no evidence that the children apprehended imminent harm.

The Allen Court required that intent could only be transferred to persons who were actually assaulted. In that case, the defendant fired multiple gunshots into a house in an attempt to "get" the owner of the house; although the bullets did not hit anyone, two people in the house (not the owner) got down on the floor during the shooting. State v. Allen, at p. *1. The facts of the case indicate that Allen "intended to assault Phil Sanders." State v. Allen, at p. *14 n. 2. The Court held that intent can be transferred to any unintended "victim." State v. Allen, at p. *15. The Court was imposing the requirement of the presence of an actual victim, in

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of unanimity error resulting from the jury instruction defining the three forms of common law assault).

order for the defendant's assaultive intent to be transferred to that person named as a victim.

A review of the decision in Allen indicates that for this Court, the dispositive fact was that the complainants in the case qualified as "unintended victims of Allen's intended assault on Phill Sanders" because they "both apprehended harm during the shooting" State v. Allen, at pp. *15-16. The Court noted that the trial court found that both Sutterman and Sanders got down on the floor during the shooting before the volley of shots ended. State v. Allen, at p. *16. Because Sutterman and Sanders reacted to the gunshots by getting down on the floor after the first shot was fired but before the final shot hit the house, this Court found that a rational trier of fact could find beyond a reasonable doubt that Debbie they experienced reasonable apprehension and imminent fear of bodily injury during the shooting. State v. Allen, at pp. *16-17.

In contrast, the present case does not include evidence that would allow a trier of fact to conclude that the three children apprehended imminent harm from incoming bullets; instead, at best, the evidence showed that the children were upset by their mother's reaction to some event after it occurred. The State argues, without support in the trial record, that the children in this

case felt fear and apprehension during the shooting. Supplemental Brief of Respondent, at pp. 3, 5, 12. At one point the State asserts that the children "must have been terrified *during* the time the multiple gunshots were fired." (Emphasis in original.) Supplemental Brief of Respondent, at p. 5. But as Mr. Elmi pointed out in his Supplemental Brief, the evidence from Ms. Aden's testimony shows that the children's upset was caused by their mother's reaction to the shooting, and indeed the children themselves never testified. Appellant's Supplemental Brief, at pp. 13-14. And, as appellant also argued, even terror or upset "during" the shooting would not amount to the apprehension of imminent harm that is required to render a person a victim of assault when paired with an intent by the defendant to cause such apprehension. The victims of this type of assault must actually perceive that they are about to suffer harmful contact. State v. Allen, at p. *14 (citing 11 Washington Pattern Jury Instructions: Criminal 35.50, at 453 (2d ed. 1994)). The perception must be that harm is "imminent," which term is defined as "about to occur at any moment: impending." WEBSTER'S SECOND NEW COLLEGE DICTIONARY 553 (1986).

This is why the Allen Court placed so much emphasis on the fact that the victims in that case testified that they got down on the

floor during the shooting and before the volley of shots ceased. Fear or upset after the bullets ceased incoming would not have amounted to the apprehension of imminent harm that is required in order to render a person a victim of this type of common law assault.[2]

None of the cases cited by the State support a conclusion that a person can be a "victim" of assault without actual suffering the harm that is required under the law of assault. Thus in State v. Wilson, 125 Wn.2d 212, 883 P.2d 320 (1994), the two "unintended" victims. Hensley and Hurles, were both actual victims of assault by intentional battery because they were struck by the bullets fired by the defendant with the intent to batter two different persons. State v. Wilson, 125 Wn.2d at 219 (stating that "any unintended victim is assaulted if they fall within the terms and conditions of the statute") (Emphasis added.).[3]

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[2]The State's cited case of State v. Hough, 585 N.W.2d 393, 395-97 (Minn. 1998) is unhelpful to decision in the present case because Minnesota rejects the principle, clearly accepted in this State as shown by Allen and by State v. Bland, 71 Wn. App. 345, 860 P.2d 1046 (1993), that the victim of assault (committed by an act intending to cause apprehension of harm) must actually apprehend imminent harm.

[3]The other Washington case cited by the State is inapplicable on its face to the present case. In that case, State v. Salamanca, 69 Wn. App. 817, 851 P.2d 1242 (1993), the Court of Appeals upheld assault convictions as to all the occupants of a car because, the Court held, the defendant's intent to harm all of the occupants could be inferred based on his actions of following the car and

The remaining case cited by the State also support the conclusion that the "unintended" victims of assault must be actual victims of an assaultive crime. Thus in State v. Gillette, 102 N.M. 695, 699 P.2d 626 (1985), the defendant was found guilty of trying to poison the mother of children that he had abused. The soda in which the defendant placed the poison was ingested by the mother, and alsl by two other persons, and the defendant was found guilty of attempted murder of all three persons when the poison they ingested failed to kill them. State v. Gillette, 699 P.2d at 705. This case is akin to an attempted murder conviction affirmed as to a person shot by the defendant who failed to die, in addition to convictions as to persons whom the bullet also hit, but who also failed to die. In such instance, the two unintended persons would be "actual victims" of attempted murder. Such a result would be consistent with this Court's decision in Allen, in which the two unknown victims were "actual victims" of assault because they in

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firing a series of shots into the car. Salamanca, at 826. Other of the cases cited by the State are also inapposite on their facts. The case of Short v. Oklahoma, 980 P.2d 1081, 1098-99 (Okla. Crim. App. 1999), involved a defendant who threw a bomb into a building with the actual "belief that the firebombing would cause the death of one or more of the inhabitants." (Emphasis added.) Short, at 1098. And in that State, intent to kill is shown by intent that an act cause death, or "belief that it would cause death." Short, at 1098. The case of People v. Vang, 87 Cal.App.4th 554 (2001), involved evidence that the defendants intended to kill any occupant of the house into which they shot.

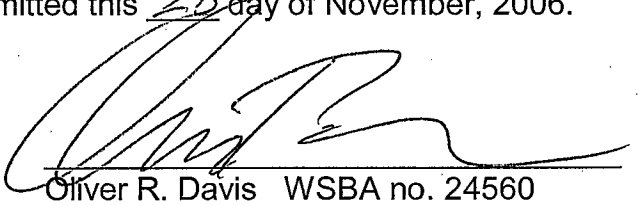
fact apprehended imminent harm about to occur. As discussed herein, supra, and in Appellant's Supplemental Brief, the evidence in this case shows, at most, "upset" in the children after the defendant's conduct, and there was no evidence of a perception by the children that they were about to be shot.

Similarly, the case of People v. Bland, 28 Cal.4th 313, 48 P.3d 1107 (2002), involved two persons who were actually wounded by the defendant's gunshots, in addition to person who was killed by the defendant's actions taken with the subjective intent to kill that person. Because the two persons were actual victims of assault, the court found that the defendant could be found guilty of assaulting those individuals. Bland, 48 P.3d at 1118-19. Once again, this case differs from the instant case, in that the evidence here did not show that the children apprehended imminent harm by bullets fired from the defendant's gun, and they were not, therefore, actual victims of assault. Per Allen, intent cannot be "transferred" under the law of assault, so as to render a defendant guilty of assault of unintended victims, unless those persons are actual victims of assault.

C. CONCLUSION

Based on the foregoing, Mr. Elmi requests that this Court reverse his convictions as requested in the Opening Brief and Supplemental Brief.

Respectfully submitted this 28 day of November, 2006.



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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON, Respondent, v. ALI ELMI, Appellant.	)	NO. 56460-9-I

CERTIFICATE OF SERVICE

I, MARIA RILEY, CERTIFY THAT ON THE 29TH DAY OF NOVEMBER, 2006, I CAUSED A TRUE AND CORRECT COPY OF THE **APPELLANT'S SUPPLEMENTAL REPLY BRIEF** TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] KING COUNTY PROSECUTOR'S OFFICE APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 29TH DAY OF NOVEMBER, 2006.

X_____

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